FILED
SEP 15

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

FEDERAL LIFE INSURANCE COMPANY,
a Corporation,
Petitioner,
vs.
LESTER ETTMAN,
Respondent.
No. 560.

RESPONDENT'S BRIEF.

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INDEX.

Page

Statement 1

Points and authorities 3

Argument 5

Conclusion 11

Cases Cited.

Adamos v. N. Y. Life Ins. Co., 293 U. S. 386..... 11

Aetna Life Ins. Co. v. Daniels, 42 S. W. (2d) 584, 328 Mo. 876 ..... 3, 8

Aetna Life Ins. Co. v. Smith, 73 Fed. 318..... 4

Aetna Life Ins. Co. v. Southern, 306 U. S. 563..... 11

American Surety Co. v. Dean (Mo. App.), 243 S. W. 415 (not officially reported) 3

Cable v. Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188 .....3, 11

DiGiovanni v. Camden Fire Ins. Assn., 296 U. S. 64, 80 L. Ed. 47 ..... 3, 9

Emery v. N. Y. Life Ins. Co., 257 S. W. 162 (Springfield Ct. of App.), reversed on other grounds, 316 Mo. 1292, 295 S. W. 571..... 3

Enelow v. N. Y. Life, 293 U. S. 379.....3, 11

Griesa v. Mutual Life Ins. Co., 169 Fed. 509..... 4

Johnson v. Mutual L. I. Co., 293 U. S. 335 (70 Fed. [2d] 41) 3

Leimer v. State Mutual Life Assurance Company (C. C. A. 8), 108 F. (2d) 302..... 5

Lumbermen's M. Cas. Co. v. Bagley (C. C. A. 10th), 62 Fed. (2d) 617 ..... 3, 4

Metropolitan Life Ins. Co. v. Erdwins, 229 Mo. App. 437, 83 S. W. (2d) 597.....4, 11

Mueller v. John Hancock M. L. Ins. Co. (Mo. App.), 261 S. W. 709 3
New York Life Insurance Co. v. Calhoun, 97 Fed. (2d) 896 3
N. Y. L. Co. v. Miller (C. C. A. 8th), 73 Fed. (2d) 350, 97 A. L. R. 562 3
Pacific Mutual L. Ins. Co. v. Parker, 71 Fed. (2d) 872 (C. C. A. 10) 4
Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501 ..... 4, 11
Schuerman v. Ins. Co., 165 Mo. 641, 65 S. W. 723 3
State ex rel. John Hancock M. L. I. Co. v. Allen, 313 Mo. 384 ..... 3, 11
State ex rel. Life Ins. Co. v. Allen, 306 Mo. 197, 267 S. W. 832 4
State ex rel. National Council v. Trimble, 292 Mo. 371 7
Terry v. New York Life Insurance Company, 104 Fed. (2d) 498 5
Wollums v. Health & Acc. Assn., 46 S. W. (2d) 259, l. c. 262, 226 Mo. App. 647 ..... 3, 7, 11

Textbook Cited.

Couch, Vol. 6:
P. 5079, Par. 1433 ..... 3, 9
P. 501, Par. 1418 3
P. 5023, Par. 1406 3
P. 5080 3

Statutes Cited.

R. S. Mo. 1929, Sec. 5732 (Mo. Ann. Statutes, p. 4373), now Sec. 5843 ..... 3, 9
28 U. S. C. A., page 256, Par. 284 ..... 4, 10

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RESPONDENT'S BRIEF.

STATEMENT.

The policy in question was a health and accident policy issued in 1928 by petitioner. It provided, among other things, that the loss of the sight of both eyes should constitute total and permanent disability. The assured lost the sight of both eyes. He made claim for disability benefits. Thereupon the petitioner brought a suit in equity to cancel the policy claiming misrepresentation and false statements at the time of the application in 1928.

Then the respondent brought a suit in the state court to recover the benefits which were due him from the time of his disability. This was removed to the federal court, where the petitioner filed an answer to the lawsuit, pleading exactly the same facts that it pleaded in its suit to cancel the policy.

A motion to dismiss the petitioner's suit to cancel the policy (R. p. 25) was sustained by the trial court (R. p. 26) and affirmed by the Court of Appeals (R. p. 46).

POINTS AND AUTHORITIES.

A suit to cancel the policy will not lie either under the federal rule or under the Missouri rule where the contingency upon which the policy becomes payable has occurred.

Section 5732, R. S. Mo. 1929 (Mo. Ann. Statutes, p. 4373), now Sec. 5843;

Schuerman v. Ins. Co., 165 Mo. 641, 65 S. W. 723;

Emery v. N. Y. Life Ins. Co., 257 S. W. 162 (Springfield Ct. of App.), reversed on other grounds, 316 Mo. 1292, 295 S. W. 571;

Couch, Vol. 6, p. 5079, Par. 1433;

Couch, Vol. 6, p. 501, Par. 1418;

Couch, Vol. 6, p. 5023, Par. 1406;

American Surety Co. v. Dean (Mo. App.), 243 S. W. 415 (not officially reported);

Couch, Vol. 6, p. 5080;

Johnson v. Mutual L. I. Co., 293 U. S. 335 (70 Fed. [2d] 41);

Mueller v. John Hancock M. L. Ins. Co. (Mo. App.), 261 S. W. 709, affirmed on this point in

State ex rel. John Hancock M. L. I. Co. v. Allen, 313 Mo. 384;

DiGiovanni v. Camden Fire Ins. Assn., 296 U. S. 64, 80 L. Ed. 47;

Lumbermen's M. Cas. Co. v. Bagley (C. C. A. 10th), 62 Fed. (2d) 617;

N. Y. L. Co. v. Miller (C. C. A. 8th), 73 Fed. (2d) 350, 97 A. L. R. 562;

Aetna Life Ins. Co. v. Daniels, 42 S. W. (2d) 584, 328 Mo. 876;

Wollums v. Health & Acc. Assn., 46 S. W. (2d) 259, l. c. 262, 226 Mo. App. 647;

Enelow v. N. Y. Life, 293 U. S. 379;

Cable v. Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188;

New York Life Insurance Co. v. Calhoun, 97 Fed. (2d) 896.

II.

The fact that other suits may be brought on the same policy is not such a multiplicity of suits as to warrant equity assuming jurisdiction. The judgment in the first case is res adjudicata.

Lumbermen's Mut. Cas. Co. v. Bagley, 62 Fed. (2d) 617;
Pacific Mutual L. Ins. Co. v. Parker, 71 Fed. (2d) 872 (C. C. A. 10);
28 U. S. C. A., page 256, par. 284;
Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501;
Griesa v. Mutual Life Ins. Co., 169 Fed. 509;
Aetna Life Ins. Co. v. Smith, 73 Fed. 318;
State ex rel. Life Ins. Co. v. Allen, 306 Mo. 197, 267 S. W. 832;
Metropolitan Life Ins. Co. v. Erdwins, 229 Mo. App. 437, 83 S. W. (2d) 597.

III.

If petitioner has any defense, it has an adequate remedy at law. The respondent is entitled to a jury trial.

(See cases cited above, Points I and II.)

ARGUMENT.

In the "Questions Presented" set out on page 9 of the petitioner's petition for writ of certiorari and brief, the petitioner fails to set out under the three alleged questions presented **that the contingency upon which the policy became payable had occurred.**

It is indeed passing strange that the petitioner should tell this Court that there is a conflict between the decision of the Court of Appeals and this Court, and other Courts of Appeals, and cite numerous cases which petitioner contends support its position, and yet in its motion for rehearing (R. pp. 47-50) the petitioner should only cite one case which it now cites in the petition for certiorari, namely, the case of **Terry v. New York Life Insurance Company,** 104 Fed. (2d) 498. The other cases which are cited in the motion for rehearing are not cited in the petition for certiorari, and likewise the cases cited in the petition for certiorari, with the exception of the Terry case, are not cited in the motion for rehearing.

We have no disposition to analyze all the cases cited by the petitioner, because they are without application. There is not a single case that supports the legal position of the petitioner. For instance, in **Leimer v. State Mutual Life Assurance Company** (C. C. A. 8), 108 F. (2d) 302, the case was a law case, not a suit in equity. The question was whether there were sufficient facts stated to set out a case for relief. There was no question of the right to file a suit to cancel the policy.

In **Terry v. New York Life Ins. Co.** (C. C. A. 8), 104 Fed. (2d) 498, the policy contained an incontestability clause of two years. It also involved different parties, who would not be bound by the law action. The Court expressly recognizes the Missouri rule governing the con-

struction of insurance policies written in Missouri, and points out the special circumstances which take the Terry case out of the ordinary rule under which a suit to cancel the policy cannot be brought after the policy becomes payable. In the Terry case, if the assured became totally disabled before age 60, the company was to pay a monthly income of $35.00 to the assured, but if such disability resulted from insanity, payment was to be made to the beneficiary in lieu of the assured. At the time the policy was issued, the assured was single. He afterward married. In 1933 he entered into a settlement agreement with the company, whereby, upon his death, the proceeds of the policy should be paid to his wife in 144 monthly installments, and in case of her death before all the installments were paid, then to his son. In case of the death of both his wife and his son, the remainder was to be paid in one sum to his sister and brothers, share and share alike. In 1936 he was adjudged to be of unsound mind, and his wife was appointed guardian. She became entitled to receive all disability benefits in her own right as beneficiary, and not as guardian. Later in 1936 the insured, by his guardian, filed a suit at law seeking to recover the disability benefits from November, 1934, to December, 1936. The company's answer pleaded a general denial, and as an affirmative defense alleged that the assured had been insane during all the period of time during which disability benefits were claimed. It further pleaded that in the event of the insured's disability resulting from insanity the disability benefits were to be payable to the beneficiary, and therefore the guardian had no interest in the disability benefits and was not a proper party plaintiff. In 1938 an amended petition was filed in the action in the state court, substantially similar to the guardian's petition, except that the wife individually was also made a party plaintiff. The company brought a suit

in the federal court, naming as defendants the wife, both individually and as guardian of the assured, and naming the minor son as a defendant. The Court points out that there are peculiar circumstances in the case; that none of the beneficiaries named in the policy have vested interests, because the change of beneficiary was reserved in the policy by the assured, and the assured was insane. The Court in its opinion discusses the Missouri rule and quotes from the case of State ex rel. National Council v. Trimble, 292 Mo. 371, where the Missouri Supreme Court says:

> "It has been expressly decided in this state that after the death of the insured an action in equity to cancel the policy is not the proper remedy, and that when suit has been brought on the policy the insurance company cannot convert the action into a case in equity by alleging fraudulent misrepresentations in the procurement of the policy and praying for its cancellation." (Citing cases.)

Judge Thomas, who wrote the opinion in the Terry case, quotes from the case of Wollums v. Mutual Benefit Health & Accident Ass'n, 226 Mo. App. 647, 46 S. W. (2d) 259, as follows:

> "That after the happening of the contingency or event upon which the policy was to become payable, the rights and obligations between the parties become fixed and absolute and the sums insured become a purely legal demand, giving the parties the right to have the issues tried by a jury."

The Court in the Terry case then discusses the rule that a fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the parties or their privies. (Citing Missouri cases.) The Court in the Terry case then points out the special circumstances, saying:

"The defect in this argument is that in a future suit on the policy the parties may not include the plaintiff in the suit now pending in the state court. The insured may be killed in an accident covered by the double-indemnity provision of the contract. In the meantime he may change the beneficiaries entirely or Katherine L. Terry may predecease the insured. In either case the beneficiaries entitled to sue for recovery will be parties other than the parties to the action now pending in the state court. It is not claimed that such new or contingent beneficiaries are privies to the plaintiffs in the law action pending."

In the case at bar the only person interested is the insured, and if in a law case the issue is squarely presented and the company prevails, the insured will be barred from bringing any further proceeding. The matter will be res adjudicata. No one else would have any interest. The contrary will be true if the insured prevails. But in no event can the insurer have a policy canceled in equity after the occurrence of the contingency upon which it becomes payable, unless there is an incontestable clause or other special circumstances, as pointed out in the Terry case, supra. As pointed out in the Terry case, the rights and obligations between the parties become fixed and absolute and the sum now due to the assured is purely a legal demand giving the parties the right to have the issues tried by a jury.

The case of **Aetna Life Insurance Co. v. Daniel**, 42 S. W. (2d) 584, 328 Mo. 876, cited by the petitioner, contains an incontestable clause. The Missouri Supreme Court in that case held that there must be an allegation in the petition that no suit on the policy was instituted, and there must be a further allegation that the insurer could not set up as defenses the facts showing nonliability. The Supreme Court also held that a defense of fraud for misrepresentation is a legal defense triable by a jury, regardless of the

misrepresentation statute in Missouri, unless by some special circumstances the company is precluded from making the defense in a suit upon the policy.

In the case of **Di Giovanni v. Camden Fire Ins. Co.**, 296 U. S. 64, l. c. 68, this Court, speaking through Mr. Justice Stone, held:

> "The Court has recently pointed out that equity will not compel the cancellation and surrender of an insurance policy procured by fraud where the loss has occurred and a suit at law to recover the amount of the loss is pending or threatened. Enelow v. New York Life Ins. Co., 293 U. S. 379, 79 L. Ed. 440."

Couch on Insurance, Vol. 6, p. 5079, Par. 1435, also lays down the rule that a suit in equity to cancel a policy does not lie after the rights of the parties have become fixed by a loss within the terms of the contract, also holding, page 5082, that the insurance company has an adequate remedy at law by way of defense to an action on the policy, and to hold otherwise would be a denial of the right to trial by jury.

See also **supplement** in **Couch**, governing paragraph 1435 et seq.

The policy itself is noncancelable, and provides (R. p. 12):

> "This policy cannot be cancelled, altered or amended unless with the consent of the assured."

The Missouri Misrepresentaton Statute, Section 5732, R. S. Mo. 1929 (Par. 6142, R. S. 1919), provides:

> "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed

to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury."

Petitioner argues, as it argued in the Court of Appeals, that a judgment in a suit at law would not be res adjudicata as to future claims that the respondent might have for other injuries or other diseases, and it is further argued that such accident or diseases would not be a defense to any future action unless the said misrepresentations were material and contributed to the thing which caused his disability. The petitioner is asking this Court, as he asked the lower courts, to disregard the plain mandate of the Missouri statute making the issue triable to a jury. If such a thing could be done in this case, then the statute could be evaded in all cases where the matter allegedly misrepresented did not contribute to the contingency or event, and the Misrepresentation Statute would become a mere empty shell as to such cases. The statute provides, "and whether it so contributed in any case shall be a question for the jury."

The constitutionality of Section 5732, R. S. Mo. 1929 (now Sec. 5843), is no longer open to question.

Northwestern Mut. Life Ins. Co. v. O'Malley, 95 S. W. (2d) 860, certiorari denied 299 U. S. 585.

Furthermore, the **Federal Statute, Judicial Code**, 28 U. S. C. A., page 256, Par. 384, provides that no suit in equity shall be brought where there is an adequate remedy at law. The language is as follows:

"Suits in Equity, When Not Sustainable. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Under the Missouri law, even regardless of the Missouri Misrepresentation Statute, after the happening of the con-

tingency or event on which the policy became payable, the rights and obligations of the parties become fixed and absolute, and the sums due become purely legal demands, giving the parties the right to have the issues tried by jury.

> Wollums v. Mutual Benefit Health & Accident Association, 226 Mo. App. 647, 46 S. W. (2d) 259, 262;
> State ex rel. Life Ins. Co. v. Allen, 306 Mo. 197, 214, 267 S. W. 832.

In the **Wollums case**, cited supra, the Court held that the only circumstances that will permit an insurance company to maintain a suit in equity to cancel a policy after the occurrence of the contingency making the policy payable is an incontestable clause in the policy.

The same rule is laid down in the case of **Metropolitan Life Ins. Co. v. Erdwins**, 229 Mo. App. 437.

To the same effect are the rulings in **Phoenix Assurance Co. v. Bailey**, 13 Wall. 616, 20 L. Ed. 501; **Enelow v. N. Y. Life Ins. Co.**, 293 U. S. 379; **Adamos v. N. Y. Life Ins. Co.**, 293 U. S. 386; **Aetna Life Ins. Co. v. Southern**, 306 U. S. 563; **Cable v. U. S.**, 191 U. S. 288.

In the **Enelow case**, cited supra, Chief Justice Hughes held that there was no merit in the contention that the remedy at law was not adequate because the petitioner was not the only person interested in the policy and that the premiums would be refundable to the decedent's executors. The case was remanded with instructions to try the case at law.

CONCLUSION.

It is obvious that the petitioner has no right to maintain an action in equity; it has a full and complete remedy at law. The contingency upon which the policy is payable has occurred. The claim has become a legal demand

triable to a jury, or, as the Court of Appeals in its opinion points out, the monthly payments became due, and then held:

> "Under these circumstances, the obligation to pay became fixed and absolute. Thereafter, the monthly indemnity became legal demands. To these legal demands the plaintiff may plead the defense of fraud and misrepresentation, and if that issue should be sustained, the judgment establishing fraud in the procurement of the policy would be res judicata which can be availed of as to all subsequent claims for indemnity."

Furthermore, the very fact that the petitioner has set out in its answer to the lawsuit exactly the same facts which it sets out in the suit to cancel, clearly indicates that it considers the legal defense as adequate.

The respondent is entitled to a jury trial, which the petitioner is seeking to avoid. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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